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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

ELLIOT C. RICHARDSON, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA,
PLACIDO RUIZ, AND JULIO RUIZ,

BRIEF FOR CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

ELLIOT C. RICHARDSON, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA,
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BRIEF FOR CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 15-30) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 31-32) was entered on April 16, 1973. The order of the court of appeals denying respondents' Petition for Clarification and Rehearing (App. A, *infra*, pp. 17-18) was decided on May 22, 1973. On July 9, 1973, the Chief Justice extended the time of petitioners for filing a petition for a writ of certiorari to and including August 14, 1973. The petition for a writ of certiorari was filed on

August 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Mexican aliens who commute to the United States to work only during the agricultural season and who do not maintain residences in this country when they return to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b)) "returning from a temporary visit abroad" (8 U.S.C. 1101 (a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has "a residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States" to perform temporary services or labor" (8 U.S.C. 1101 (a)(15)(H)).

STATUTES INVOLVED

8 U.S.C. 1101 provides in pertinent part:

> § 1101. Definitions.
>
> (a) As used in this chapter—
>
> * * * *
>
> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> * * * *
>
> (H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country * * *.
>
> * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * *

(27) The term "special immigrant" means—

* * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

* * * *

(33) The term "residence" means the place of general abode; place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

8 U.S.C. 1181(b) provides:

§ 1181. Admission of immigrants into the United States.

* * * *

(b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 U.S.C. 1182(a)(14) provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to re-

ceive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to non-preference immigrant aliens described in section 1153(a)(8) of this title.

8 C.F.R. 211.1 provides:

§ 211.1 Visas.

* * * *

(b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *.

STATEMENT

Robert Bustos and Lupe Murquia, two California farm workers, and the United Farm Workers Organizing Committee, an organization of farm workers, filed a class action on December 1, 1969, in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought a declaratory judgment and injunctive relief against the practices of the Immigration and Naturalization Service in allowing Mexican aliens, who live in Mexico, to enter the United States daily or seasonally to perform agricultural labor. The complaint alleged that the Service—

(1) Violates the Immigration and Nationality Act of 1952, 8 U.S.C. 401, *et seq.*, and its own regulations by allowing such aliens (hereinafter described as "daily and seasonal commuters") to enter the United States with a Form I-151, a so-called green card, instead of an immigrant visa. The complaint alleged that the commuters could not use a green card because they are not "returning resident immigrants" (8 U.S.C. 1181(b)), are not an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)), and are not immigrants "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)). If the commuters may not enter pursuant to green cards, they can obtain an immigrant visa only if the Secretary of Labor certifies under 8 U.S.C. 1182(a)(14) that there are not sufficient workers in the United States willing to perform agricultural work and that their entry will not affect wages and working conditions of domestic workers. No such certification could be issued because the Secretary of Labor has determined that the supply of farm labor is

sufficient and the admission of farm laborers would adversely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6;

(2) Violates the Immigration and Nationality Act by considering commuters as immigrants rather than as non-immigrants "having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor" under 8 U.S.C. 1101(a)(15)(H). If commuters are non-immigrants, they cannot enter the United States because Section 1101(a)(15)(H) allows entry only "if unemployed persons capable of performing such service or labor cannot be found in this country" and the Secretary of Labor has never issued such a certification for farm laborers in the western United States because no shortage of unskilled farm labor exists there;

(3) Violates the Service's regulations prohibiting commuters from acting as strikebreakers (8 C.F.R. 211.1(b)(1)), by allowing commuters to take employment at places where the Secretary of Labor has determined that a labor dispute exists merely because the commuter had previously worked for the same employer during a prior agricultural season.

On May 13, 1970, the district court granted the motion of the four respondents, who are Texas farm workers, to intervene as plaintiffs on behalf of themselves and all farm workers in Texas. On June 8, 1970, the parties agreed to a stipulation of facts (Pet. App. D, pp. 34-37). On December 21, 1971, the district court granted without opinion the motion of the government for summary judgment, denied the motions of plaintiffs and plaintiff-intervenors for summary judgment, and dismissed the complaint (Pet. App. C, p. 33).

On appeal, plaintiffs and plaintiff-intervenors renewed their arguments on all the claims described above. On

April 16, 1973, the court of appeals held that, with regard to daily commuters, "the statutory language is not as plain and unambiguous as plaintiffs contend. * * * [T]he concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City where he has a permanent commitment and interest in the ongoing vitality and soundness of the city, and where he may have, for example, fraternal and cultral associations, may well consider himself a New Yorker even though his house in the suburbs is located in New Jersey or Connecticut" (Pet. App. A, p. 28). The court said that since the practice began in 1927 and had continued for 45 years, and since Congress had never expressed any desire to change it, "it is fair to assume that the historic daily commuter practice known to Congress was expected to continue unchanged in the 1952 law" (*id.* at 27). The court therefore concluded that daily commuters were residents of the United States within the meaning of the Act and could continue to enter the country as immigrants using a green card.

In contrast, the court of appeals found that seasonal commuters are not "returning resident aliens" and therefore the entry of such aliens without immigrant visas "is in violation of the clear and plain language of the statute" (Pet. App. A, p. 21). Moreover, since "[a]ll commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor," the court found that they came clearly within 8 U.S.C. 1101(a)(15)(H) which defines such persons as non-immigrants (*id.* at 22-23). The court concluded that, unlike in the case of daily commuters, the seasonal commuter system was created by the Service after 1964 even though Congress had both deliberately allowed the bracero program, which allowed the import of Mexican agricultural workers, to lapse and had strength-

ened the Immigration Act of 1965 to safeguard American labor (*id.* at 18-21).

On April 30, 1973, respondents filed a Petition for Clarification and Rehearing limited to two points. First, respondents contended that commuters who come daily to the United States only during the agricultural season, rather than daily throughout the year to a permanent job, are properly considered as seasonal commuters under the court's reasoning and therefore could no longer enter the United States with a green card. Respondents, however, asked that the position of these commuters be clarified since the court's opinion was not entirely clear. Second, respondents asked that the court decide the contentions of the parties as to the Service's strikebreaker regulations which had not been decided or even addressed in the opinion.

On May 22, 1973, the court of appeals denied the motion (App. A, *infra*, pp. 17-18). However the court explicitly did not determine the merits of the arguments advanced by respondents. Instead, the court stated that "the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue" and that "[i]f a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal." [1]

[1] Petitioners' statement includes a brief description of the commuter system since 1927 (Pet. 6-7). While petitioners assert that "[m]ost of the pertinent facts are not in dispute" (*id.* at 6), the statutory and administrative history of the commuter practice, which is exceptionally complex, was strongly disputed as to both daily and seasonal commuters in the briefs filed by the parties in the court of appeals.

ARGUMENT

The decision of the court below is, as petitioners assert (Pet. 11), inconsistent with the two-to-one decision of the Court of Appeals for the Ninth Circuit in *Gooch* v. *Clark*, 433 F.2d 74 (1970), certiorari denied, 402 U.S. 955.[2] In *Gooch* the court held that both daily and seasonal commuters are returning resident immigrants, are not non-immigrants and therefore can enter the United States with a green card. Thus, the *Gooch* decision is inconsistent with that of the court below as to seasonal commuters.

Nonetheless, respondents submit that a writ of certiorari should not be granted for four reasons.[3]

1. First, a conflict of Circuits is a strong basis for seeking a writ of certiorari because such a conflict generally results in the application of different legal rules in different parts of the country. Thus this Court has stated that "[b]ecause of a subsequent contrary holding of the Court of Appeals for the Second Circuit * * * and the need for a uniform rule on this point, we granted certiorari to resolve the conflict." *Commissioner* v. *Bilder*, 369 U.S. 499, 501 (1962). See also Stern & Gressman, *Supreme Court Practice* 154 (4th ed., 1969). Here, however, the court of appeals has made clear, by considering Canadian as well as Mexican commuters, that it was de-

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[2] Contrary, however, to the *amicus curiae* brief of the California Farm Bureau Federation, *et al.*, no conflict exists between the decision below and that of the Court of Appeals for the Ninth Circuit in *Sam Andrews' Sons* v. *Mitchell*, 457 F.2d 745 (1972). That case held that the strikebreaker provision in 8 C.F.R. 211.1(b)(1) was unauthorized by Congress and was therefore invalid. The court below did not reach respondents' contentions concerning the proper meaning of the regulation, let alone decide whether the regulation was valid.

[3] A conflict of circuits is of course not an automatic basis for a grant of certiorari. See Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465 (1953).

ciding the Service's legal obligations throughout the country. The district court, on remand from the court of appeals, will therefore presumably issue an injunction applying to the entire country.[4] Consequently, the court is not required to review the decision below in order to obtain a uniform national rule.

2. Second, review by this Court would appear to be premature. In *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, this Court said that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." The court of appeals has directed "the district court in the first instance, to consider whether further relief is appropriate, in the implementation of our decision" (App. A, *infra*, p. 18). The district court will also determine the issues relating to commuters who enter the country daily only during the agricultural season and the meaning of the strikebreaker regulation. After these issues have been resolved, and the relief determined both by the district court and court of appeals, this Court can appropriately decide whether to grant review. However, this Court is being asked to review at this time only a portion of the controversy.

3. The decision below, insofar as it relates only to seasonal commuters, is also of limited importance. According to petitioners' brief below, there are less than 8,300 seasonal commuters in comparison to over 45,000 daily commuters. Brief for Appellees, p. 3.[5] Moreover, as the court of appeals concluded (Pet. App. A, p. 9),

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[4] While it is conceivable that the district court's injunction would only apply to California and Texas and that the court of appeals would affirm such a limited injunction, this Court could review the case at that time as a result of the conflict of legal rules which would then be presented.

[5] While respondents estimated below that the number of seasonal commuters was much larger, petitioners claimed that their figures were based on actual counts made at the border.

the affidavit of the Secretary of State expressing concern about termination of the commuter practice was plainly directed toward the large numbers of commuters who travel across the border daily from nearby Mexican and Canadian communities.

4. Finally, respondents submit that the court below was correct in determining that commuters who live in Mexico and enter the United States only for the agricultural season cannot enter the United States pursuant to a green card. The decision below as to seasonal commuters must be upheld if either of its two alternative holdings was proper.

Most simply, the court of appeals properly found that seasonal commuters are non-immigrants under 8 U.S.C. 1101(a)(15)(H). The Act defines an immigrant as an alien not coming within the ten specified categories of non-immigrants. 8 U.S.C. 1101(a)(15). One of the categories of non-immigrants is "an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor * * *." 8 U.S.C. 1101(a)(15)(H). This definition applies precisely to persons whose permanent homes are and continue to be in Mexico and who come to the United States for only a portion of each year to provide temporary labor.

Even if seasonal commuters are deemed immigrants, the court of appeals correctly concluded that they are required to enter the United States pursuant to a valid immigrant visa. The general rule is that immigrants may not enter the United States without immigrant visas (8 U.S.C. 1181(a)) which in turn requires certification by the Secretary of Labor that their entry will not cause injury to domestic workers (8 U.S.C. 1182(a)(14)). The Act provides an exception "in such cases or in such classes of cases and under such conditions as

may be by regulations prescribed" for "returning resident immigrants, defined in section 1101(a)(27)(B)." 8 U.S.C. 1182(b). However, it is clear that seasonal commuters do not come within this exception on three distinct grounds.

First, seasonal commuters are not "returning resident immigrants." The Act defines "residence" to mean (8 U.S.C. 1101(a)(33)):

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

It is obvious that seasonal commuters, who by definition have their permanent home in Mexico and have no permanent home in the United States, have their "principal, actual dwelling place in fact" in Mexico and are not residents of the United States.

Second, seasonal commuters do not come within the definition of 8 U.S.C. 1101(a)(27)(B) because they are not "lawfully admitted for permanent residence" and are not "returning from a temporary visit abroad." The Act defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigrant laws, such status not having changed." 8 U.S.C. 1101(a)(20). While seasonal commuters were once lawfully accorded the privilege of residing permanently in the United States, their status has changed because they have not assumed residence in the United States. As Judge Eugene Wright demonstrated in his dissenting opinion in *Gooch* v. *Clark*, any other interpretation of the definition of "lawfully admitted for permanent residence" "makes nonsense of the congressional policy embodied in no fewer than five sections of the Act [which also use this phrase] * * * and is entirely contrary to the plain meaning of two others."

433 F.2d at 83. In any event, a seasonal commuter entering the United States is not "returning from a temporary visit abroad"; on the contrary, since the seasonal commuter leaves his permanent home in Mexico to come temporarily to the United States, his temporary visit abroad is from Mexico to the United States rather than from the United States to Mexico.

Third, 8 U.S.C. 1181(b) allows immigrants to enter the United States without immigrant visas only pursuant to regulations. The only applicable regulation is 8 C.F.R. 211.1(b)(1) which provides: "In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151." This phrase—"unrelinquished lawful permanent residence in the United States after a temporary absence abroad" was no mere inadvertence since it is repeated seven additional times in 8 C.F.R. 211.1(b) and 211.2. It is obvious that a seasonal commuter who has his home in Mexico and comes to the United States for only part of a year does not have an "unrelinquished" and "permanent" residence in this country.

The court of appeals found (Pet. App. A, p. 30):

> As to the post-1964 practice of the Service in regard to seasonal commuters, it is not only recent in origin but is so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute.

When farmers in the southwestern United States saw that the end of the bracero program was near, they obtained immigrant visas for many of their Mexican workers. Thus, when the bracero program ended in 1964, many ex-

braceros, now nominally permanent resident aliens, started entering the country as seasonal commuters. Immigration and Naturalization Service, "Commuters—Historical Background, Legal Challenges and Issues" in *Report of Select Commission on Western Hemisphere Immigration*, p. 104 (1968). As James S. Hennessy, the executive assistant to the Commissioner of the Service, testified before a House committee in 1969 (Hearings on Employment of "Green Card" Aliens During Labor Disputes before Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess. 70, 73 (1969)):

> A new class has come into being whom I would call the seasonal worker, a person who comes into the United States, for instance, at the opening of a growing season, has moved north as the crops mature; and at the end of the growing season, he has returned to Mexico.
>
> * * * *
>
> The seasonal worker is a person who came into being largely after the repeal of the bracero law.
>
> In fact, many of them are former braceros who have been admitted to the United States temporarily for employment under that act.

In response to written interrogatories posed by the Senate Subcommittee on Migratory Labor in 1970, the Service described the seasonal commuter as follows (INS Responses, p. 1-10):

> The seasonal worker or seasonal commuter is a relatively new concept under the immigration laws. It developed after the end of the bracero program in 1964 * * *.

Thus, the Service created a new class of commuters after 1964 to avoid the restrictions imposed by Congress in the Immigration Act. While petitioners now request a factual hearing on this issue (Pet. 13-14), they, as well as

respondents, moved for summary judgment in the district court on the ground that "there are no material facts concerning which there is any genuine issue." Defendants' Cross Motion for Summary Judgment, p. 1. Defendants did not request a factual hearing on this issue either in the district court or the court of appeals. On the contrary, they like respondents, relied upon various legislative and other materials to establish the history of the commuter system. They are not entitled to a factual hearing now that the court of appeals has properly found, based on the clear statements of the Service itself, that petitioners' position is not supported by any long-standing administrative practice (Pet. App. A, pp. 18-21).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.[6]

Respectfully submitted,

BRUCE J. TERRIS
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Attorneys for Respondents

SEPTEMBER 1973

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[6] Respondents are filing a petition for a writ of certiorari in this case. However, that petition will seek review only if the government's petition is granted. We believe that if this Court grants review concerning the commuter practice insofar as it involves seasonal commuters, it should also consider the same practice involving daily commuters. The Service's actions as to both seasonal and daily commuters are based upon the identical statutory provisions and regulations and are otherwise clearly interrelated.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 72-1178

Civil Action 3386-69

[Filed May 22, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1179

Civil Action 3386-69

ROBERT BUSTOS, ET AL.
UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1200

Civil Action 3386-69

ROBERT BUSTOS, ET AL.
CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Before: Edwards,* Circuit Judge for the Sixth Circuit; Leventhal, Circuit Judge and Pratt,** U.S. District Judge of the U.S. District Court for the District of Columbia.

ORDER

Appellants have filed a petition for clarification and rehearing with respect to this court's judgment of April 16, 1973. The Court is of the view that the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue. It is for the district court, in the first instance, to consider whether further relief is appropriate, in the implementation of our decision. If a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal. Accordingly, it is

ORDERED by the Court that appellants' aforesaid petition for clarification and rehearing is denied.

Per Curiam

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* Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

** Sitting by designation pursuant to Title 28 U.S. Code Section 292(a).